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No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

REPLY BRIEF FOR PETITIONERS

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October 15, 1991

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ARGUMENT

I.

IT IS CLEAR UNDER THIS COURT'S PRECEDENT THAT THE "REASONABLE EFFORTS" CLAUSE OF THE AAA DOES NOT CREATE A FEDERAL RIGHT UNDER SECTION 1983

A. Plaintiffs Compound The Error Of The Court Below By Failing Even To Acknowledge, Let Alone Apply, The Controlling *Pennhurst* Standard

Any analysis in this case under 42 U.S.C. § 1983 ("Section 1983") must begin with the fact that the federal Adoption Assistance and Child Welfare Act of 1980 (the "AAA") is a federal-state cooperative funding statute, enacted pursuant to Congress' power under the Spending Clause of the Constitution. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1

(1981), this Court made clear that because such a statute is "in the nature of a contract," the very legitimacy of Congress' ability to create individual federal rights there "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " *Id.* at 17. *Pennhurst* and its progeny require that when asked to infer the existence of a federal right in the AAA, courts must conduct a "crucial inquiry" as to "whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25; *see Wilder v. Virginia Hosp. Ass'n,* 110 S. Ct. 2510 (1990); *Wright v. Roanoke Redevelopment & Housing Auth.,* 479 U.S. 418 (1987).

The fundamental flaw throughout the arguments set forth by plaintiffs and their *amici* is their failure to recognize this basic premise for congressional action. Indeed, like the court of appeals below, plaintiffs devote but a single paragraph to a discussion of *Pennhurst,* suggesting that *Pennhurst* is inapplicable because the statute at issue there, unlike the AAA, was "hortatory, not mandatory." (Resp. Br. 19 (quoting *Pennhurst,* 451 U.S. at 24); *see also* App. 11a).[1] Yet this Court has squarely established that the clear statement required by *Pennhurst* consists of *two* components: a statutory provision creating individual federal rights must be both mandatory and specific. *See, e.g., Wilder,* 110 S. Ct. at 2517; Pet. Br. 16-17.

Thus, in *Wilder,* this Court's analysis did not stop when the Court determined that the Boren Amendment was mandatory in requiring a state plan providing for the payment to medical facilities of "reasonable and adequate" Medicaid rates. Rather, the Court analyzed the context, statutory structure, legislative history, and regulatory framework before concluding that Congress

[1]Briefs will be cited as follows: Brief for Petitioners ("Pet. Br."); Brief for the United States as *Amicus Curiae* ("US Br."); Brief of the States of Louisiana, *et al.* as *Amicus Curiae* ("States' Br."); Brief of Respondents ("Resp. Br."); Brief of the National Council of Juvenile and Family Court Judges as *Amicus Curiae* ("NCJJ Br."); Brief of the American Bar Association as *Amicus Curiae* ("ABA Br."); Brief for American Association for Protecting Children, *et al.,* as *Amici Curiae* ("AAPC Br."); Brief of the Illinois State Bar Association, *et al.,* as *Amici Curiae* ("ISBA Br."); and Brief *Amicus Curiae* of the National Association of Counsel for Children, *et al.* ("NACC Br.").

also had sufficiently provided an "objective benchmark" to define a federal right to "reasonable and adequate" rates.[2] *Wilder,* 110 S. Ct. at 2522-23; *see* Pet. Br. 18-19.

Despite the plain directive of *Wilder,* plaintiffs assert that no "objective benchmark" is required. (Resp. Br. 36). Instead, plaintiffs contend that mere use of the word "reasonable" in a statute is sufficient to create a federal right. (Resp. Br. 28-30). There is simply no basis under *Pennhurst* or its progeny for such an assertion. To the contrary, this Court undertook a searching analysis of the "entire context" of the Boren Amendment in *Wilder* to determine whether the statute created a right to "reasonable and adequate" reimbursement rates. Likewise, in *Wright,* 479 U.S. 418, this Court examined in detail the statutory structure, legislative history, and regulatory scheme of the Brooke Amendment to determine the existence of a right to a "reasonable" rent allowance.[3]

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[2]Despite plaintiffs' lengthy exposition in their brief, the question as to whether Section 671(a)(15) is mandatory (or was intended to benefit abused and neglected children) is not at issue in this case. (Resp. Br. 15-22). Defendants maintain that Section 671(a)(15) sets forth a mandatory obligation which may be enforced in individual cases by the state courts (*see* 42 U.S.C. § 672(a)(1)) and administratively by the Secretary of Health and Human Services (*see* 42 U.S.C. § 671(b)). (Pet. Br. 17; US Br. 24-26). Plaintiffs are incorrect in their rhetorical argument that Illinois is seeking to "accept federal funding while disregarding the Act's mandate." (Resp. Br. 12). Defendants here seek only to avoid an intrusion by the federal courts into the delicate and highly individualized area of child abuse and neglect, an area Congress expressly chose to leave to state child welfare agencies, state courts, and the Secretary. (*See* US Br. 12).

[3]Mere string citations of other statutes using the word "reasonable," without regard to their relevance to the "reasonable efforts" clause at issue here, are no substitute for the required inquiry as to Congress' actions specifically in enacting Section 671(a)(15). (NACC Br. 13 n.8). Likewise, none of the cases interpreting such "reasonableness" provisions cited by plaintiffs and their *amici* involves an inquiry even remotely analogous to the examination of congressional intent dictated by *Wilder* and *Wright.* For example, the two most recent cases cited by plaintiffs, *International Organization of Masters, Mates, & Pilots v. Brown,* 111 S. Ct. 880 (1991), and *United States v. R. Enterprises, Inc.,* 111 S. Ct. 722 (1991), both involve application of enforceable "reason-

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Plaintiffs' novel assertion that this Court's analysis must include the specific underlying facts of this case also is contrary to the limits imposed by federalism on the creation of federal rights. The *Pennhurst* requirement that federal rights be clear at the time States accept federal funds, 451 U.S. at 17, 23-25, refutes any notion that Spending Clause statutes are to be "judged on an as-applied basis." (Resp. Br. 24-25 (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988))).[4]

(Footnote 3 continued from previous page)
ableness" requirements, not whether Congress intended those requirements to be enforceable in the first place.

Plaintiffs' reliance on *Youngberg v. Romeo*, 457 U.S. 307 (1982), is similarly misplaced. (Resp. Br. 30; *see also* NACC Br. 26-27). In *Youngberg*, this Court held that the Constitution requires "minimally adequate training . . . as may be reasonable in light of [involuntarily committed persons'] liberty interests." 457 U.S. at 322. *Youngberg* then specifically defines "unreasonable" conduct as being "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. The AAA contains no comparable standard or definition by which the "reasonableness" of a State's efforts under Section 671(a)(15) may be measured.

[4]The cases plaintiffs cite in no way support their argument. The defendants in *Maynard*, 486 U.S. 356, and *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), asserted that it violated due process to apply vaguely worded statutes that failed to provide the defendants proper notice that their conduct was illegal. Such a due process claim must be tested under the facts of each specific case. *See Maynard*, 486 U.S. at 361. Here, by contrast, the question is whether Congress expressed a clear intention that Section 671(a)(15) be individually enforceable in federal court, a question that must be analyzed independent of the facts of any subsequent individual case. Where there is no "clear statement" of congressional intent, there is no federal right on any facts.

Plaintiffs' argument that there must be a federal right because the facts of this case allegedly reveal a clear violation of the "reasonable efforts" clause is similarly flawed. Plaintiffs cite to *Wilder* for the proposition that while there may be a range of "reasonable efforts," the facts of this case represent efforts that a federal court may clearly find outside that range. (Resp. Br. 24 (citing *Wilder*, 110 S. Ct. at 2523)). In *Wilder*, the Boren Amendment set forth a series of factors that clearly defined the parameters of the "range of reasonable rates" and provided standards against which "unreasonable" rates were to be measured. No such guidance is provided here. (*See* App. 25a (Manion, J., dissenting)).

Finally, plaintiffs' *amici* provide a compelling argument for reversal of the decision below. Despite plaintiffs' repeated invocation of congressional intent (*see, e.g.*, Resp. Br. 15, 32, 33, 40), both the ABA and the National Council of Juvenile and Family Court Judges admit that they unsuccessfully *asked* Congress in 1988 and 1989 to change the AAA to authorize a private right of action. (NCJJ Br. 18; ABA Br. 2). Plaintiffs now ask this Court to do what Congress has refused to do: create a federally enforceable individual entitlement to "reasonable efforts" to keep or return a child home in each case. Under *Pennhurst,* this Court cannot impose new federal rights on the States where Congress has declined to do so, and this Court should reject plaintiffs' claim.

B. Plaintiffs Misread The Entire Context Of The AAA, Which Demonstrates That Section 671(a)(15) Does Not Create A Federal Right

By disregarding the principles of *Pennhurst,* the examination by plaintiffs and their *amici* of the context, language, legislative history, and regulatory scheme of the AAA misses the mark. Instead of finding the clear congressional statement required by *Pennhurst,* plaintiffs' analysis distorts even the plain language of the statute itself in an effort to locate a right to "systemic" efforts to preserve or reunify families. Plaintiffs' labors are fruitless, as there is no clear statement creating such a right.

This distortion echoes throughout plaintiffs' argument, as they repeatedly assert that a federal right to "reasonable efforts" exists because "a court need only determine that caseworkers are not being assigned in order to find a violation of the Act—an 'inquiry well within the competence of the judiciary.' " (Resp. Br. 27; *see id.* at i, 11). The question before this Court, however, is not whether the AAA creates a federal right to caseworkers.[5] The

[5]Indeed, plaintiffs argue that Congress "noted in particular that caseworker assignment problems were a key impediment to family reunification." (Resp. Br. 16). Yet the AAA itself makes no mention of caseworkers. If, as plaintiffs assert, Congress was aware of caseworker problems and declined to specify any obligations by the States in that regard, this Court should not now do so.

question is whether Congress has provided the States a clear statement defining an enforceable right in each case to "reasonable efforts" to keep or return an abused or neglected child home.

1. There Is No Evidence That Congress Chose To Create A Federal Right To "Reasonable Efforts" To The Exclusion Of Other Existing Child Welfare Standards

Without citing any authority, plaintiffs assert that in the AAA, Congress considered the difference of opinion that existed in the child welfare field and "authoritatively resolved the issue" by creating a federal right to "reasonable efforts." (Resp. Br. 19; *see also* NACC Br. 24). They maintain that defendants' explanation as to the existing tension between a "reasonable efforts" standard favoring parental interests and a standard based on the child's best interests is "irrelevant" and "obscure[s]" this Court's analysis. (*Id.*).

However, as explained in *Wilder,* 110 S. Ct. at 2518, the Court must consider the entire context of a federal funding statute to determine whether Congress intended to create new enforceable rights. When Congress acts in an area of traditional state concern and federal intervention may disrupt long-settled institutional arrangements and substantive law, this Court properly declines to view the statute in isolation.

This case underscores the crucial importance of this broad inquiry. As discussed in Petitioners' Brief at 23-24, the AAA was enacted in the context of evolving views of child welfare, which included growing dissatisfaction with the then exclusive standard by which children were removed from their homes based on their "best interests." Because such a standard ignored parental interests, critics suggested use of a standard focusing on whether "reasonable means" were available to protect the child at home. *See, e.g.,* Mnookin, *Foster Care—In Whose Best Interest?,* 43 Harv. Educ. Rev. 599, 613-27 (1973).

This led to adoption of the "reasonable efforts" clause in Section 671(a)(15), *see* 125 Cong. Rec. 22681 (1979) (remarks of Sen. Cranston), and the requirement in Section 672(a)(1) that state courts consider *both* "reasonable efforts" *and* the "welfare of [the]

child" in making individualized determinations as to whether a child should be removed from home.[6] *See* 42 U.S.C. § 672(a)(1); Pet. Br. 24-26. Thus, contrary to plaintiffs' assertion, Congress clearly did not intend in Section 671(a)(15) to establish a federal right to "reasonable efforts" to the exclusion of all other considerations.[7] While Congress expressed a preference for "reasonable efforts" to preserve or reunify families, it expressly left to the state judiciaries the delicate task of weighing the "reasonable efforts" and "best interests" standards in light of the circumstances "in each case."[8]

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[6]Notably, the version of the AAA originally passed by the House of Representatives in 1979 did not contain the state court provision of Section 672(a)(1), although it included a "reasonable efforts" provision. However, in finally enacting the AAA, Congress explicitly chose to add in Section 672 the consideration by state courts of both "reasonable efforts" and the "welfare of [the] child." S. Rep. No. 336, 96th Cong., 2d Sess. ("S. Rep.") 1, 15, *reprinted in* 1980 U.S. Code Cong. & Admin. News ("USCCAN") 1448, 1464.

[7]The ISBA *amici* misread defendants' argument on this point. (ISBA Br. 16-17). Defendants do not dispute the importance of providing family preservation and reunification services as part of the overall range of programs to be included in a foster care system. However, there continue to be differing views as to the manner in which these "reasonable efforts" are to be balanced against other interests of the child. *See, e.g.*, Garrison, *Child Welfare Decision Making: In Search of the Least Drastic Alternative,* 75 Georgetown L.J. 1745, 1802 (1987). Clearly, there is still no consensus that the standard of "reasonable efforts" to family preservation or reunification should *predominate* over all other considerations, including the best interests of the child. *See, e.g., In re Ashley K.,* 212 Ill. App. 3d 849, 871, 879, 571 N.E.2d 905, 918, 923 (1991) (despite recognizing the AAA's family reunification aim, the court holds that "a child's best interest is and must remain inviolate and impregnable from all other factors, including the interests of the biological parents.").

[8]Plaintiffs question why Section 671(a)(15) is so "vague and amorphous as to be beyond the competence" of the federal courts to enforce when defendants acknowledge that the AAA provides in Section 672(a)(1) for state courts to make such determinations. (Resp. Br. 30-31; *see also* NACC Br. 10). Obviously, Section 672(a)(1), unlike Section 671(a)(15), makes clear that the consideration of "reasonable efforts" must be balanced with a determination that continuation at home "would be contrary to the welfare of [the] child." 42 U.S.C. § 672(a)(1). Moreover, Section 672(a)(1) explicitly requires the case-by-case determination implicit in the requirement that "reasonable efforts" be made

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2. Plaintiffs Disregard The Plain Language Of The Statute

Plaintiffs and *amici* repeatedly insist that the only right created by Section 671(a)(15) is a right to a "system" of "reasonable efforts." (Resp. Br. 46; NACC Br. 25-26; NCJJ Br. 15; ABA Br. 24; ISBA Br. 19; *see also* NACC Br. 26 (suggesting existence of a right to a "structure")). However, neither plaintiffs nor their *amici* explain how a statute providing that "reasonable efforts" be made "*in each case*" creates a right solely to a *system* of such efforts. It is not sufficient simply to argue that because this case involved systemic allegations that all "reasonable efforts" cases will be similarly limited. (Resp. Br. 46).

In order to avoid the plain language of Section 671(a)(15), plaintiffs and their *amici* distort the terms of the Act by attempting to merge the "reasonable efforts" clause of Section 671(a)(15) —the only provision of the AAA at issue here—with a wholly separate section requiring that the state plan under Section 671 be "in effect in all political subdivisions of the State." 42 U.S.C. § 671(a)(3); *see* Resp. Br. i, 1, 2, 14; ISBA Br. 5, 19, 20, 27, 28; NACC Br. 2, 5. Plaintiffs never mentioned Section 671(a)(3) in their Complaint (J.A. 5), their brief in the district court (R. 60), their brief in the Seventh Circuit (Brief of Plaintiffs-Appellees), or their response to the Petition. They cannot raise it for the first

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(Footnote 8 continued from previous page)
"in each case." In the absence of an individual assessment of the risk of harm to an abused or neglected child, the term "reasonable efforts" to keep or return the child home has no substance.

Plaintiffs also make the puzzling suggestion that state juvenile courts lack any expertise in child welfare. (Resp. Br. 31; *see also* NACC Br. 19). Their argument likely comes as a surprise to their *amici,* the National Council of Juvenile and Family Court Judges, whose entire brief in this Court is based on the premise that specialized state courts have expertise in child welfare decision making. (*See* NCJJ Br. 16 ("individual child welfare determinations are uniquely appropriate for state, not federal, determination")). Moreover, plaintiffs mislead the Court when they suggest that "in Illinois, ... all trial courts are courts of general jurisdiction, and only one county has judges who hear only abuse and neglect cases." (Resp. Br. 31 (citations omitted)). In fact, state law expressly contemplates specialized juvenile courts hearing abuse, neglect, and dependency cases. *See* Juvenile Court Act §§ 801-1 *et seq.*, Ill. Rev. Stat. ch. 37, ¶¶ 801-1 *et seq.*

time in this Court. *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 38-39 (1989).[9]

Plaintiffs cannot avoid the fact that Section 671(a)(15) by its very terms sets forth an inherently subjective case-by-case standard, not an "objective benchmark" as required under *Wilder.* Defendants do not maintain that the requisite "objective benchmark" must be a "mindless" numeric calculation. (Resp. Br. 34 n.16). Rather, *Wilder* and *Wright* hold that Congress must provide some standards against which the "reasonableness" of the State's efforts may be judged. Thus, this Court found that the multiple factors set forth in the Boren Amendment, including whether rates were sufficient to provide Medicaid recipients with "reasonable access" to adequate inpatient services,[10] provide the context and standards by which courts could consistently assess the reasonableness of reimbursement rates. *Wilder,* 110 S. Ct. at 2522-23; Pet. Br. 28-29.[11] No such factors, context, or standards exist anywhere in Section 671(a)(15).

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[9]Regardless, Section 671(a)(3) adds nothing to the analysis of the "reasonable efforts" clause. Section 671(a)(3), like Section 671(a)(15), is one of seventeen distinct requirements for the state plan. *See* § 671(a). It creates no overarching requirement. On its face, Section 671(a)(3) merely requires geographic uniformity in the state plan. *See Boddie v. Wyman,* 434 F.2d 1207, 1210 (2d Cir. 1970) (identical language in Titles IV-A and XVI aimed at elimination of "arbitrary differences in welfare payments between areas in the same state"), *aff'd,* 402 U.S. 991 (1971).

[10]Plaintiffs argue that if federal courts can determine what constitutes "reasonable access" to hospital services, they can determine whether a State's efforts to keep or return children home are "reasonable." (Resp. Br. 34 n.16). However, the federal right at issue in *Wilder* was the right to "reasonable and adequate" reimbursement, *not* "reasonable access" to hospital services. Federal courts interpreting the Boren Amendment will not be asked to define "reasonable access"; they will use that factor to assist in determining whether Medicaid rates have been set so low that, among other things, Medicaid recipients are unable to obtain inpatient services. This inquiry provides a standard against which to measure the "reasonableness" of rates. (*See* Pet. Br. 28 n.15).

[11]These statutory factors provide the benchmark by which all individualized determinations as to hospital rates may be adjudged reasonable. (*See* Resp. Br. 34-35). There are no factors under Section 671(a)(15) by which the efforts to keep or return a child home "in each case" similarly may be consistently measured as "reasonable." In one

(Footnote continued)

If a federal right to such a case-by-case determination is held to exist, it is inevitable that this new right will result in federal case-by-case reviews, leading to an untenable intrusion by the federal courts into the individual decisions of state juvenile courts and child welfare specialists.[12] For example, in *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990), Section 671(a)(15) provided the vehicle for three parents of children in DCFS custody to obtain federal court review and individualized orders in their respective cases. The report of the magistrate judge is illustrative of the examinations federal courts will be called upon to make if Section 671(a)(15) is held to create an enforceable right. In a series of detailed findings, the magistrate judge reviewed the reasons why the plaintiffs' children were removed from home (*e.g., id.* at 1196), the specifics of the case plans developed for the plaintiffs (*e.g., id.* at 1196-97), the services recommended and provided for the plaintiffs (*id.*), and the professional opinions of the plaintiffs' caseworkers (*e.g., id.* at 1198-99). In the case of plaintiff Gina Johnson, the dispute centered on resolution by the federal court of a difference of professional opinion between the plaintiff's DCFS caseworker and private agency caseworker. *Id.* at 1198.[13]

(Footnote 11 continued from previous page)
case, the determining factor may be the severity of harm to the child, while in another it may be the willingness of the parents to participate in treatment, while in yet another it may be the special medical or psychiatric needs of the child; and in each of these cases, it may or may not be reasonable to balance these factors against the relative cost to the State of providing services to the child at home or in foster care. Unlike the Boren Amendment, the AAA provides no guidance as to how any of these determinations are to be made.

[12]Plaintiffs characterize the prediction of an avalanche of individual federal claims as "apocalyptic" and "non-legal." (Resp. Br. 45; *see also* NACC Br. 23). In fact, however, the consequences that will follow from creation of a new federal right under Section 671(a)(15) are plainly relevant to whether Congress intended to create such a right and whether individual enforcement is consistent with the statutory scheme.

[13]The ISBA *amici*, which include the class members in *Norman*, suggest that *Norman* was a class action involving only systemic actions by DCFS. (ISBA Br. 12-13). In fact, defendants contested class certification as inappropriate in that case, and no decision on class certification had been reached at the time the individual injunctions were issued. *See*
(Footnote continued)

Plaintiffs and their *amici* provide no answer as to how claims under Section 671(a)(15) would be limited to avoid a proliferation of such individual cases throughout the federal courts, or any indication that Congress intended to permit such federal court review.[14] Their assertions that individual claims would regularly be barred from federal court by the doctrines of collateral estoppel, res judicata, and abstention (Resp. Br. 46) are also refuted by *Norman*, where defendants' arguments on each of these points were rejected. *See Norman*, 739 F. Supp. at 1189-90. As the *Norman* court found, "[w]hile the state court may have the power to order the type of individual relief presently requested, there is no active proceeding in which such relief is being sought." *Id.* If a federal right to "reasonable efforts" is established by this Court, nothing will prevent future plaintiffs from avoiding state juvenile courts and bringing their claims first to federal court.[15] The inevitable result will be a federalization of all child welfare decision making relevant to the efforts made to preserve or re- families.

(Footnote 13 continued from previous page)
Norman, 739 F. Supp. at 1184 n.1. The ISBA *amici*'s discussion also overlooks the decision to deny injunctive relief to plaintiff Gina Johnson, a decision necessarily predicated on an examination of individual, non-systemic actions by DCFS. *Id.* at 1196-99. Furthermore, although the district court found that the plaintiffs had suffered from alleged systemic deficiencies, the court also cited state court precedent where "individual parents were permitted to claim violations of the AAA without proving systemic deficiencies." *Id.* at 1188 n.13.

[14]In addition to *Norman*-type injunctive actions, a ruling that Section 671(a)(15) creates a federal right likely could bring a flood of individual damages actions. *See, e.g., Del A. v. Edwards*, 855 F.2d 1148 (5th Cir. 1988) (upholding damage claims under the AAA and affirming denial of summary judgment against state defendants on qualified immunity grounds), *app. dismissed*, 867 F.2d 842 (1989); *L.J. v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (same), *cert. denied*, 488 U.S. 1018 (1989).

[15]Plaintiffs contend that the courts may require future plaintiffs to exhaust state administrative remedies before bringing federal litigation. (Resp. Br. 47). However, no court has suggested that the AAA's state court hearing requirement must be exhausted prior to federal litigation, and a similar argument was rejected by this Court in *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

3. The AAA's Legislative History Does Not Demonstrate That Congress Intended To Create A Federal Right To "Reasonable Efforts"

None of the arguments plaintiffs marshal substantiates plaintiffs' contention that "[t]he history of the Act demonstrates that Congress intended § 671(a)(15) to be judicially enforceable." (Resp. Br. 32). Initially, plaintiffs argue that because Congress enacted the AAA after this Court's decision in *Miller v. Youakim*, 440 U.S. 125 (1979), Congress "incorporated the enforceability of State plan requirements . . . into the state plan requirements in Title IV-E." (Resp. Br. 32). *Miller*, however, interpreted a precisely defined requirement of Title IV-A, and says nothing about whether vague statutory provisions in Title IV-A or any other title may create enforceable rights.[16]

Plaintiffs also contend that there must be an individual enforceable right under Section 1983 because "Congress made the reasonable efforts requirement the touchstone of the Act." (Resp. Br. 12). The legislative history, however, shows that Congress' primary purpose in enacting the AAA was to restructure the federal funding mechanism for foster care. As plaintiffs and *amici* point out (Resp. Br. 15; AAPC Br. 15), the previous Title IV-A foster care program gave States a fiscal incentive to place and keep children in foster care by providing unlimited federal matching funds for foster placement with no such assistance for placement prevention options. *See, e.g.*, S. Rep. at 10, 15, *reprinted in* 1980 USCCAN at 1459, 1465.

The AAA replaced the foster care funding mechanism of Title IV-A with a combination of unlimited adoption assistance and a capped foster care funding program. "The committee believes

[16]If plaintiffs' argument were correct, this Court in *Wilder* would not have conducted a searching inquiry into the substance of the Boren Amendment, which also is a "State plan requirement" under the Social Security Act. Moreover, this Court in *Miller* applied a *Pennhurst*-style "clear statement" test: "Had Congress intended to exclude related foster parents from the definition of 'foster family home,' it presumably would have done so explicitly, just as it restricted the definition of 'child care institution.' " *Miller*, 440 U.S. at 137. To the extent *Miller* guided Congress in drafting the AAA, this Court reminded Congress to define terms and state its intentions clearly and unambiguously.

that the combination of an open-ended adoption assistance program and a closed-end foster care program represents an important restructuring of Federal incentives toward permanent placement of children." S. Rep. at 16, 1980 USCCAN at 1466. That restructuring of federal fiscal incentives, and not the various procedural requirements of Section 671, was the key reform of the AAA. *See* 125 Cong. Rec. 29503-04 (1979) (remarks of Sen. Moynihan, one of the statute's sponsors); *see also Vermont Dep't of Social and Rehabilitation Servs. v. United States Dep't of Health and Human Servs.*, 798 F.2d 57, 59 (2d Cir. 1986) (the AAA creates only "fiscal incentives to encourage a more active and systematic monitoring of children in the foster care system"), *cert. denied*, 479 U.S. 1064 (1987). As this Court noted in *Pennhurst*, 451 U.S. at 18: "Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States."

Plaintiffs also cite isolated statements by Senator Cranston, referring to the role of courts in evaluating whether preventive services should be provided prior to the removal of a child, as somehow evidencing congressional intent to create a private right of action under Section 1983. (Resp. Br. 32-33). These statements make no reference to enforcement of the AAA by individuals in federal court, and instead serve merely to underscore the role of state courts in weighing "reasonable efforts" and the "welfare of [the] child" as set forth in Section 672(a)(1). As Senator Cranston later points out, the AAA "leav[es] to the discretion of the States the precise mechanisms" for implementing the statute's provisions. 125 Cong. Rec. 22685 (1979).[17] Congress nowhere expressed an intent to have federal courts intrude on state decision making in an area this Court has always found to be uniquely within the province of the States. *See, e.g., Thompson v. Thomp-*

[17]Plaintiffs attempt to analogize this "substantial discretion" under the AAA to that afforded the States by the Boren Amendment in *Wilder*. (Resp. Br. 24). Plaintiffs overlook a crucial distinction in the legislative history of each statute. Although the Boren Amendment gave States a certain amount of flexibility, Congress explicitly stated in the legislative history its intent to continue the prior practice of federal court enforcement by medical facilities. *See Wilder*, 110 S. Ct. at 2521-22.

son, 484 U.S. 174, 186 (1988); *Moore v. Sims*, 442 U.S. 415 (1979).[18]

In the absence of any "objective benchmark" provided by Congress, plaintiffs seek to impose on the States a benchmark created out of cases and advocacy materials generated *after* the statute's enactment. Plaintiffs contend that state court cases decided after 1980 give sufficient guidance as to the definition of the "reasonable efforts" clause. (Resp. Br. 35). Once again plaintiffs ignore *Pennhurst*, which requires that a State be able to ascertain the contours of the bargain it enters at the time it accepts federal funds. *Pennhurst*, 451 U.S. at 17, 23-25. Even if the state cases provided any sort of uniform framework defining "reasonable efforts," which they do not (Pet. Br. 25-26), *post hoc* rulings cannot define the contract between Congress and the States.

For the same reason, the "standards" promoted by various advocacy groups defining "reasonable efforts" cannot be used to impose federal rights on the States. (*See* AAPC Br. 22-24). Congress did not adopt (or even refer to) those standards, most of which were issued long after the AAA was enacted in 1980. (*Id.*). *See* Child Welfare League of America, *Standards for Service to Children and Families in Their Own Home* (1984) x-xi (noting that pre-1980 preliminary standards "could not reconcile the then-current differences in purpose, philosophy, social work theory and practice"; revised standards were not issued until 1984). The States could not possibly have accepted an obligation to meet those standards in 1980. Outside advocacy groups cannot create new federal rights by fiat. *Cf. Western Air Lines, Inc. v. Board of Equalization*, 480 U.S. 123, 130 n.* (1987) ("attempt at the creation of legislative history through the *post hoc* statements of interested onlookers is entitled to no weight").[19]

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[18]Contrary to plaintiffs' contention (Resp. Br. 49), this deference by the federal courts extends to matters involving state intervention in cases of child abuse and neglect. *See, e.g., Moore*, 442 U.S. at 435; *DeShaney v. Winnebago County Dep't of Social Servs.*, 812 F.2d 298, 304 (7th Cir. 1987), *aff'd*, 489 U.S. 189 (1989).

[19]Without a clear definition by Congress of what constitutes "reasonable efforts," the court of appeals used Illinois' own actions as the stan-

(Footnote continued)

4. Federal Regulations Do Not Provide The Objective Benchmark Missing From Section 671(a)(15)

Plaintiffs erroneously assert that the regulations implementing the AAA set forth the necessary benchmark. (Resp. Br. 33-35). Yet the regulation at issue here provides no guidance at all: it merely lists a host of services the States *may* provide. 45 C.F.R. § 1357.15(e)(2).[20]

In fact, as described in the Brief for the United States, the Secretary considered and rejected a detailed mandatory regulation of the type referred to in *Wilder* and *Wright.* (US Br. 20-22). After careful consideration, the Secretary determined that it would be "an inappropriate and unnecessary intrusion to dictate a specific set of services" under Section 671(a)(15). 48 Fed. Reg. 23,104, 23,107 (1983) (adopting final rule implementing Section 671(a)(15)). Instead, the Secretary viewed it as "essential" to permit the States to have "flexibility and responsibility for these services decisions." *Id.*

Plaintiffs do not challenge this decision by the Secretary as arbitrary or unreasonable. Thus, the Secretary's determination to leave to the States the ability to develop resource priorities and

(Footnote 19 continued from previous page)
dard by which "reasonableness" was to be measured. Again, this construct ignores the basic contract premise set forth in *Pennhurst,* and will lead to federal rights and standards that will vary among each of the 50 States. (Pet. Br. 33-35).

Moreover, the very innovation in child welfare services intended by the AAA likely will be discouraged if the opinion below is affirmed, as States move to limit their liability by reducing the scope of their "reasonable efforts" activities. (Pet. Br. 39-40). Plaintiffs assert that this argument "confus[es] right with remedy." (Resp. Br. 48). They are mistaken. The district court and court of appeals in this case looked to Illinois' own voluntary actions to determine what efforts were "reasonable." (App. 11a-12a). Thus, the right, and not merely the remedy, was based on the State's own voluntary efforts.

[20]Plaintiffs gloss over the distinction between the *mandatory* factors to be considered under the regulatory schemes in *Wilder,* 110 S. Ct. at 2522, and *Wright,* 479 U.S. at 432, and the non-binding nature of Section 1357.15(e)(2). (Resp. Br. 33). The distinction is crucial. The laundry list of services in Section 1357.15(e)(2) in no way channels the discretion of state decision makers.

individual service choices in the context of limited funds, *see id.* at 23,106-07, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See also Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches.").

C. The AAA Provides A Comprehensive Remedial Scheme To Review "Reasonable Efforts" In Individual Cases

Notwithstanding the AAA's comprehensive judicial and administrative enforcement mechanisms (*see* Pet. Br. 40-42),[21] plaintiffs assert that Congress could not have intended to foreclose private remedies for "systemic violations" through Section 1983. (Resp. Br. 36-39). Plaintiffs' argument, however, erroneously assumes that Section 671(a)(15) creates a "systemic" right. (*Id.* at 37).

Plaintiffs acknowledge that the AAA provides for an explicit state court determination of "reasonable efforts" at the time the State takes custody of a child. 42 U.S.C. § 672(a)(1). (Resp. Br. 30). Nonetheless, they argue that this protection cannot evince a congressional intent to preclude Section 1983 actions because state courts are not required to make the determination at other points during a child's case. (*Cf.* ABA Br. 6-16 (arguing that Section 671(a)(15) ensures that state agencies develop adequate information for the state court in individual cases)). In so doing,

[21]Plaintiffs once again contend that defendants have waived this and other arguments by not adequately raising them in the Petition. (Resp. Br. 36 n.20). Although the questions in the Petition were narrowly tailored to the facts of this case, the question whether plaintiffs may enforce Section 671(a)(15) through Section 1983 clearly encompasses the issue of the statute's comprehensive enforcement scheme. (*See* Resp. Br. 13 (acknowledging that enforceable rights and remedial scheme are both prongs of Section 1983 analysis; *quoting Wilder,* 110 S. Ct. at 2517)). This issue was fully briefed and decided below. (App. 13a-14a). (*See also* Pet. Br. 42 n.28 (addressing plaintiffs' argument that defendants waived implied right of action argument even though that argument was explicitly preserved in the body of the Petition)).

plaintiffs disregard the statute's other protections, including detailed case plans (§§ 671(a)(16), 675(1)),[22] judicial or administrative review of each child's case every six months (§§ 671(a)(16), 675(5)(B)),[23] and judicial dispositional hearings within eighteen months of a child's placement (§§ 675(5)(C)).[24]

Plaintiffs next contend that state administrative activities cannot preclude private enforcement through Section 1983.[25] (Resp. Br. 37 (citing *Patsy,* 457 U.S. 496)).[26] The AAA, however, contains both judicial and administrative protections, such as those this Court has found to preclude actions under Section 1983. *See Smith v. Robinson,* 468 U.S. 992, 1004 (1984) (holding that the

[22]Section 675(1)(B) requires that the case plan "assur[e] that . . . services are provided to the parents, child, and foster parents in order to . . . facilitate return of the child to his own home or the permanent placement of the child." In conjunction with the case review system defined in Section 675(5)(B), the case plan ensures timely judicial or administrative review of the efforts made to reunify children with their families "in each case."

[23]Plaintiffs contend that the case review provides "no remedy whatsoever for a State's violation of § 671(a)(15)." (Resp. Br. 38). However, the case review requirement is properly viewed in light of Congress' intent to delegate to the States primary responsibility for implementation of Section 671(a)(15) in individual cases. *See also* 42 U.S.C. § 672(a)(1). The six-month case review requirement ensures that every child in State custody has a regular opportunity to raise issues concerning the State's permanency planning for that child.

[24]Plaintiffs complain that state juvenile courts in Illinois have failed to undertake timely dispositional hearings. (Resp. Br. 38). An allegation that a State subsequently has not complied fully with a statute's *procedural* requirement, even if true, cannot compel the conclusion that Congress therefore intended to permit enforcement of the statute's substantive provisions through Section 1983.

[25]Plaintiffs *amici* also complain that the Secretary does not adequately enforce Section 671(a)(15). (*See* ISBA Br. 26; ABA Br. 23-24). As noted by the United States, however, the Secretary has determined that deference to the States is consistent with congressional intent in enacting the AAA. (US Br. 20-22). That decision should be respected by this Court under *Chevron,* 467 U.S. 837.

[26]This Court held in *Patsy* that exhaustion of State administrative remedies was not a prerequisite to a Section 1983 action. That question differs from whether Congress intended that federally mandated administrative and judicial remedies preclude Section 1983 enforcement altogether.

"carefully tailored *administrative and judicial* mechanism" set out in the Education of the Handicapped Act (the "EHA"), 20 U.S.C. §§ 1400 *et seq.*, precluded resort to Section 1983 (emphasis added)).[27]

II.

PLAINTIFFS CANNOT PROVE CONGRESSIONAL INTENT TO AUTHORIZE A PRIVATE RIGHT OF ACTION

Plaintiffs' contention that Congress authorized an implied private right of action to enforce Section 671(a)(15) merits little further comment. (*See* Pet. Br. 42-45). Plaintiffs admit that the crucial inquiry is whether Congress intended to create such a right. (Resp. Br. 39). Plaintiffs cite no evidence of that intent in the statute or its legislative history. They clearly have not met their heavy burden.

Nor do the remaining *Cort v. Ash* factors favor an implied private right of action. Contrary to plaintiffs' assertion (Resp. Br. 40), creating a private right of action is inconsistent with the statutory structure, purposes, and the tradition of State primacy in the area of child welfare. Both the AAA and its legislative history evince a congressional intent to "leav[e] to the discretion of the States the precise mechanisms" for enforcing the statute's protections. 125 Cong. Rec. 22685 (1979) (remarks of Sen. Cranston).

III.

CONGRESS COULD NOT HAVE INTENDED TO CREATE A FEDERAL RIGHT TO SERVICES FOR CHILDREN NOT IN FOSTER CARE WHEN FUNDS WERE NOT PROVIDED UNDER TITLE IV-E FOR THOSE SERVICES

In an effort to extend the purported entitlement to "reasonable efforts" to children not in foster care, plaintiffs completely distort

[27] *Smith* is closely analogous to this case. As with the AAA, the EHA's procedures included regular administrative reviews of individualized education plans for each handicapped child, 20 U.S.C. § 1414(a)(5), and judicial review. *Smith*, 468 U.S. at 1011. In such circumstances, the Court "f[ound] it difficult to believe" that Congress intended a Section 1983 remedy. *Id.*

the funding mechanism contained in Title IV-E. (Resp. Br. 41-44). Plaintiffs argue that, although Illinois receives Title IV-E reimbursement only for services to children in a "foster family home" or "child care institution," 42 U.S.C. § 672,[28] the State is free to spend the federal dollars any way it wants. (Resp. Br. 41-42). Plaintiffs miss the point. If Illinois spends a dollar on services to a child at home, the State cannot possibly be reimbursed for that dollar under Title IV-E.[29]

Defendants do not suggest "that in order to create a binding obligation, Congress must incorporate the requirement into the funding formula." (Resp. Br. at 43). The issue here is not whether Congress created a "binding requirement," but instead whether Congress created a federal right enforceable through Section 1983. Defendants' argument does not call into question Congress' power to act under the spending power. Where Congress provides no federal monies to the State under a Spending Clause statute, however, this Court should not infer a congressional intent to create sweeping new federal entitlements for every child in the State.

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[28]Plaintiffs point to the fact that the States receive partial reimbursement for costs of administering the state plan. (Resp. Br. at 43 (citing 42 U.S.C. § 674(a)(3)). This reimbursement relates solely to administration of the entire state plan and not to the provision of substantive family preservation or reunification services. *See* § 674(a)(3).

[29]Seeking to buttress their claim under Title IV-E, plaintiffs point out that the States receive federal monies under other statutes for services to children at home. (Resp. Br. 41 n.24 (citing Titles XIX, IV-B), 43 (citing Title IV-A)). Plaintiffs did not raise Titles IV-A and XIX below and specifically disavowed reliance upon Title IV-B (R. 60 at 20 n.8). They have waived this argument. *Granfinanciera*, 492 U.S. at 38-39.

Even if plaintiffs could raise these points, funding under one federal program cannot possibly form part of the "contract" between the federal government and the States under a separate program. *See Pennhurst*, 451 U.S. at 14, 24 (finding no federal right based on limited funding provided under Section 6010 of the Developmentally Disabled Assistance and Bill of Rights Act, even though additional funds were provided under other sections of the Act). Also, as defendants' comparison of Title IV-B funding *nationwide* to a single State's child welfare budget (Pet. Br. 46 n.31) shows, Title IV-B's minimal contribution is hardly sufficient to evince a congressional intent to create federal rights. *Pennhurst*, 451 U.S. at 24.

CONCLUSION

WHEREFORE, for the foregoing reasons and those in the Brief for Petitioners, petitioners Sue Suter and Gary T. Morgan respectfully ask that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit and remand for dismissal of the case.

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